

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ADOLFO GUTIERREZ AVILA, JR.,

Case No. 19-CV-3112 (PJS/ECW)

Petitioner,

v.

ORDER

VICKY JANSSEN, MCF-RC Warden,

Respondent.

Petitioner Adolfo Gutierrez Avila, Jr., was convicted in state court of two counts of criminal sexual conduct and was sentenced to 144 months in prison on each count, to be served consecutively. Avila filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. The Court adopted the Report and Recommendation of Magistrate Judge Elizabeth Cowan Wright and dismissed his petition with prejudice. *See* ECF No. 32. Since then, Avila has filed four motions for relief from judgment under Fed. R. Civ. P. 60, all of which the Court has denied. ECF Nos. 35, 39, 50, 53, 57, 61, 62, 66. Avila also appealed to the United States Court of Appeals for the Eighth Circuit, which denied his motion for a certificate of appealability and dismissed his appeal. ECF No. 55. The United States Supreme Court denied his petition for certiorari in October 2021. ECF No. 67.

This matter is before the Court on Avila's fifth Rule 60 motion for relief from judgment. Avila moves under Rule 60(b)(3), rehashing some arguments that he has previously made and also making what appear to be new claims.

Avila's motion is untimely. *See* Fed. R. Civ. P. 60(c)(1) (requiring that a motion under Rule 60(b)(3) be filed no more than a year after the entry of the judgment). Setting that aside, as the Court has already explained, to the extent he is rehashing his arguments on the merits, his arguments are irrelevant, as the Court dismissed all of his federal claims as procedurally barred. And to the extent that his arguments can be understood as new theories for relief, they are "second or successive" claims under 28 U.S.C. § 2244(b) that cannot be entertained by this Court unless Avila first obtains permission from the United States Court of Appeals for the Eighth Circuit. *See Gonzalez v. Crosby*, 545 U.S. 524, 530–31 (2005). Avila's motion is therefore denied.

In its August 11, 2021 order denying Avila's fourth Rule 60 motion, the Court warned him that, if he filed another frivolous motion, the Court may impose a filing restriction. ECF No. 66. As Avila ignored that warning, and as he has filed another frivolous motion, the Court will restrict Avila from filing any further motions in this case unless the motion is accompanied by proof that he has received permission from the United States Court of Appeals for the Eighth Circuit to file a second or successive

habeas petition. Any filing received from Avila that is not accompanied by such proof will be docketed for the record but will not be addressed by the Court.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein,
IT IS HEREBY ORDERED THAT:

1. Petitioner's motion for relief from judgment under Fed. R. Civ. P. 60 [ECF No. 68] is DENIED.
2. To the extent a certificate of appealability is necessary, no certificate will issue.
3. Petitioner is prohibited from filing any further motions in this case unless the motion is accompanied by proof that he has received permission from the United States Court of Appeals for the Eighth Circuit to file a second or successive habeas petition.
4. Any filing submitted in violation of ¶ 3 of this order will be docketed for the record but will not be addressed by the Court.

Dated: July 5, 2022

s/Patrick J. Schiltz

Patrick J. Schiltz

United States District Judge